85-1001

Supreme Court, U.S.
FILED
DEC 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
1985 Term

Wayne Louis Bohn and Sharon Anne Bohn, individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a minor and Wayne Arthur Bohn,

Plaintiffs-Petitioners,

vs.

County of Dakota; Shirley L. Utzinger, Director of Social Services, Dakota County Human Services Department; Beth Welshons, Worker, Child Protection Assessment Unit; Anthony A. Bibus, Supervisor, Child Protection Assessment Unit; Kenneth Malvey, Assistant County Attorney; Robert F. Carolan, County Attorney; Dakota County Human Services Board; John S. Voss, Chairman, Joseph A. Harris, Gerald E. Hollenkamp, Steven Loeding, and Russell L. Streefland,

Defendants-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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65pp

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-5100

Wayne Louis Bohn and Sharon Anne Bohn, Individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a Minor, and Wayne Arthur Bohn,	*	
Appellants,	*	Appeal from the United
v.	*	States District Court
County of Dakota; Shirley L. Utzinger, Director of Social Services, Dakota County Human Services Department; Beth Welshons, Worker, Child Protection Assessment Unit; Anthony A. Bibus, Supervisor, Child Protection Assessment Unit; Kenneth E. Malvey, Assistant County Attorney; Robert F. Carolan, County Attorney; Dakota County Human Services Board; John S. Voss, Chairman, Joseph A.	*	for the District of Minnesota

Harris, Gerald E. *
Hollenkamp, Steven *
Loeding and Russell L. *
Streefland, *
*
Appellees. *

Submitted: May 15, 1985
Filed: September 11, 1985

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

HEANEY, Circuit Judge.

Wayne and Sharon Bohn appeal from the district court's dismissal of their suit against Dakota County under 42 U.S.C. §1983 for failure to state a claim. For reversal, the Bohns argue, first, that the County denied them due process by failing to provide them with notice of a finding of child abuse, statement of the basis for that finding, and notice of their right to appeal;[1] and, second, that

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deficient administrative procedures for contesting or appealing a finding of child abuse violate fourteenth amendment.[2] We affirm.

I. BACKGROUND

On May 31, 1982, Wayne Bohn forcibly interceded to break up a fight between his two sons, one of whom then ran to a neighbor's house as a result. The

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The statute implicated in this challenge of the finding of child abuse is Minn. Stat. Ann. §626.556. In brief, the statute requires that certain professionals report suspected instances of child abuse to responsible county authorities who investigate the report and, if warranted, offer "protective social services" and "maintain appropriate records." We discuss relevant portions of this statute in section II, below.

2 In addition to Minn. Stat. Ann. §626.556, the statutes implicated in the Bohns' challenge to the administrative procedures for reviewing this finding include Minn. Stat. Ann. §§13.04 and 14.57-14.70 as well as certain administrative rules. We discuss relevant portions of these provisions in section IV, below.

incident prompted an investigation by the Dakota County Department of Social Services, which concluded that there was "substantial evidence" of child abuse by the Bohns. Although the Bohns disputed this conclusion,[3] the Department assigned a child protection worker to the case, pursuant to statute, and the social worker met with the Bohns and their children repeatedly in an attempt to remedy the presumed problems stemming from the alleged child abuse.

The Bohns attempted to clear the record of these charges but their efforts were generally ineffective. Initially, they complained to the County Department of Social Services and explained that they wished to contribute their side of

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[3] The allegedly abused Bohn boy was examined by a physician who found no evidence of abuse or injury.

the story to the decision-making process, but the Department refused and stated that the investigation was complete. Thereafter, through counsel, the Bohns sought to correct the record through a variety of means, including a juvenile court action to the Dakota County District Court and the Minnesota Supreme Court, and requests for action through the Dakota County Human Services Board, their county commissioner, and their state representative.

When these measures were unavailing, the Bohns filed this section 1983 action in federal court. After the complaint was amended and was before the district court on a motion to dismiss, appellants' counsel wrote to the Minnesota Office of Administrative Hearings to demonstrate that appellants had no right of direct appeal from the finding of child abuse.

That office responded by citing the rules of the Commissioner of Administration which implement the state's administrative procedure act and govern appeals of contested cases. After finding that the Bohns were provided with a procedure to challenge the finding of child abuse, and finding that it satisfied constitutional standards of due process, the district court determined that the Bohns had not stated a claim on which relief could be granted; accordingly, the district court dismissed the complaint. The Bohns appeal, arguing the due process defects we have mentioned above.

II. DUE PROCESS AND THE FINDING OF CHILD ABUSE

The procedural protections guaranteed in the fifth and fourteenth amendments to the Constitution are triggered by the existence of a protectible liberty

or property interest. Thus, the process that is due depends upon the nature of the interest at stake. In considering such questions, therefore, we engage in a two-step analysis by which we search for a protectible interest and, when one is apparent, examine the established procedures to determine whether they satisfy constitutional standards.

The privacy and autonomy of familial relationships involved in a case like this are unarguably among the protectible interests which due process protects. We can conceive of no more important relationship, no more basic bond in American society, than the tie between parent and child. In Stanley v. Illinois, 405 U.S. 645 (1972), the Supreme Court stated that the interest of a widower "in the children he has sired and raised, undecidedly warrants deference

and, absent a powerful countervailing interest, protection." Id. at 651. The Court continued:

> The interest of a parent in the companionship, care custody and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Kovacs v. Cooper, 336 US 77, 95, 93 L.Ed. 513, 527, 69 S.Ct. 448, 10 ALR2d 608 (1949) (Frankfurter, J., concurring).
>
> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential", Meyer v. Nebraska, 262 US 390, 339, 67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 ALR 1446 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 US 535, 541, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110 (1942), and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 US 528, 533, 97 L.Ed. 1221, 1226, 73 S.Ct. 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 US 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438 (1944). The integrity of the family unit has found protection in the Due Process Clause of the

Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, 67 L.Ed. at 1045, the Equal Protection clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, 86 L.Ed at 1660, and the Ninth Amendment, Griswold v. Connecticut, 381 US 479, 496, 14 L.Ed 2d 510, 522, 85 S.Ct. 1678 (1965) (Goldberg, J., concurring).

Id.

In another case considering the protections due a foster family, the Supreme Court first considered the case of natural families, and concluded that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' Moore v. East Cleveland, ante at 503, 52 L.Ed.2d 531." Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977).[4] Having identified the protectible

We also note that the Bohns have a protectible interest in their reputations at stake in this case. By identifying the Bohns as child abusers, investigating the quality of their family life, and maintaining data on them, the County Department exposed them to public opprobrium and may have damaged their standing the community.

In Wisconsin v. Constantineau, 400 U.S. 433 (1971), the Supreme Court held that "where the State attaches a 'badge of infamy' to the citizen, due process comes into play. * * * Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. at 437. The Court subsequently interpreted Constantineau in Paul v. Davis, 424 U.S. 693, 708: "We think that [the language] * * * 'because of what the government is doing to him', referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law[.]" In Paul, the Court concluded that state law did not protect respondent from publication of the fact of his arrest for shoplifting.

In light of the protectible family interest we have set forth above,

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vever, we read Constantineau as
ntrolling in this case and we disting-
sh Paul. When the County Department
nd Bohn to be a child abuser, it drove
edge into this family and threatened
very foundation. The stigma Mr. Bohn
'fers as a reported child abuser
loubtedly has eroded the family's
idarity internally and impaired the
ily's ability to function in the
munity. In light of these clear
erse effects on familial integrity and
bility, we find that Mr. Bohn's
utation is a protectible interest.
ause this stigma strikes so directly
the vitality of the family, we find
reputation interest at stake to be
arly distinguishable from the respon-
t's record of petty crimes in Paul,
ch was tied to no other protectible
erest.

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interests at stake, we next turn to the procedural protections that are due under Minn. Stat. Ann. §626.556. To assist the courts in evaluating the propriety of such procedures, the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976), identified three factors:

> First, the private interest that will be affected by the initial action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail.

Id. at 335.

Our review of the competing interests harmonized in Minn. Stat. Ann. §626.556, the procedural protections embodied in the statute, and the method for administrative reconsideration of the finding leads us to conclude that the Bohns

received adequate procedural protection.

The statute of which the Bohns complain, Minn. Stat. Ann. §626.556, (entitled "Reporting of Maltreatment of Minors"), includes a declared public policy "to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse; to strengthen the family and make the home safe for children through improvement of parental and guardian capacity for responsible child care; and to provide a safe temporary or permanent home environment for physically or sexually abused children." Minn. Stat. Ann. §626.556, subd.

1. The statute requires that certain specified professionals must report instances of suspected child abuse to local authorities, and that any other

person having such knowledge may voluntarily make such a report. Id. at subd. 3. Local welfare officials are then obligated to "immediately investigate and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible," as well as to maintain "appropriate records." Id. at subd. 10.

The records are maintained in accordance with Minn. Stat. Ann. Chapter 13 on Government Data Practices. The records maintained are private except insofar as they are disclosed to investigating, petitioning or prosecuting authorities. The subject of these records has access to these records, except that the reporter's name is disclosed only upon court order. Id. at subd. 11.

Records relating to unsubstantiated reports are destroyed unless the subject requests otherwise; substantiated records are destroyed seven months after the final entry in the case, and cases that are neither substantiated nor unsubstantiated may be maintained for up to one year. Id. at subd. 11.

Although all persons who make reports whether voluntarily or mandatorily are immune from liability if they have acted in good faith and exercised due care, id. at subd. 4, a tort remedy is created under the statute for any false reports made willfully or recklessly. Id. at subd. 5.

Although section 626.557 does not explicitly provide for a means of appeal, its two references to Chapter 13 of the Minnesota statutes regulating government data practices provide access to a

detailed process of administrative review. In section 13.04 (entitled "Rights of Subjects of Data"), anyone who is the subject of governmentally maintained data may contest the accuracy or completeness of the data. The subject is required to notify the responsible authority[5] in writing, "describing the nature of the disagreement," within thirty days. Inaccurate or incomplete data shall be corrected or the responsible authority shall notify the subject that "he believes the data to be correct". Most important, the statute provides that "[t]he determinations of the responsible authority may be appealed

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5 "Responsible authority" is defined, for political subdivisions, as "the individual designated by the governing body of that political subdivision as the individual responsible for the collection, use, and dissemination of any set of data[.]" Minn. Stat. Ann. §13.02, subd. 16.

pursuant to the provisions of the administrative procedure act relating to contested cases." Minn. Stat. Ann. §13.04 subd. 4.

Although Chapter 13 does not give a cross-reference citation to Minnesota's Administrative Procedure Act (APA), it refers to the APA by name, and that statute is set forth immediately thereafter in Chapter 14. Under section 14.57, state agencies are required to initiate contested case proceedings when they are "required by law." This has been determined to require such a proceeding where a hearing is required by statute or by constitutional provision. See Commers v. Spartz, 294 N.W.2d 321, 322 (Minn. 1980) (county required to invoke APA over alleged violation of Minnesota Criminal Rehabilitation Act); MPIRG v. Minnesota Environmental Quality

Council, 237 N.W.2d 375, 381-82 (Minn. 1975); G. Beck, Administrative Contested Case Practices in Minnesota, 37 Bench and Bar, 39 (1980). For contested cases, all parties are given an opportunity for a hearing after reasonable notice which state the time and place, and issues involved in the case. Minn. Stat. Ann. §14.58.

The state APA also provides for the creation of an office of administrative hearings, Minn. Stat. Ann. §14.48, and vests in the chief administrative law judge the authority to "adopt rules to govern the procedural conduct of all hearings." Minn. Stat. Ann. §14.51. although at the time of this proceeding these agency rules were not codified in the same manner they are now, they are publicly available and disseminated in 2 MCAR §§ 1.201-220 and 9 MCAR §§2.201-299,

Conteseted Case procedures, recodified as 1 Minnesota Rules, §§ 1205.0100-.2000 and 1400.0100-.8500 (1983).

The rules governing administrative appeals provide the time limitation for appealing (a "reasonable time" or 180 days after the responsible authority has made its decision), the address of the Commissioner of Administration to whom such appeals should be directed, and the required contents of the appeal notice. 1 Minn. Rules, §1205.1600. The case is then referred to a hearing examiner who presides at a hearing pursuant to rules for contested case hearings, 1 Minn. Rules §1400.5700-.8500. These rules provide for notice to all parties, section 1400.5600; right to counsel, section 1400.5800; discovery, section 1400.6700; evidentiary rules (which allows the admission of "all evidence

which possess probative value"), section 1400.7300; and preparation of a record, section 1400.7400; among other things. Finally, after an aggrieved party has exhausted his means of administrative review under state administrative rules, he is entitled to submit his case for judicial review of the contested case decision. Minn. Stat. Ann. §14.63-.70.

Our thorough review of these statutes and regulations persuades us that the procedures for fact-finding and review satisfy the three-pronged test in Mathews. The first factor, the private interest affected by the official action, suggests that the procedures are adequate. Although as we have observed, Mr. and Mrs. Bohn's interest in their family's solidarity and reputation as they relate to the family's vitality is a protectible interest, it is counter-

balanced by the children's interest in continued freedom from abuse or neglect. Statutes like this one must attempt to harmonize this polarity of competing interests, and we believe this statute mediates between the two by minimizing the state's interference in family life. Essentially, the state makes a finding (which is treated confidentially), offers supportive social services, and monitors the progress of the family. Under this statute taken alone, the finding is not published, the child is not ordinarily taken from the parents, and the parents are not ordinarily prosecuted. Thus, the statute is designed as a preventative measure to minimize the damage which vulnerable children might suffer from familial conflict. Because the statute effectively mediates between the private interests, we cannot say it is constitu-

tionally defective on the first Mathews factor.

The second Mathews factor for evaluating the constitutional adequacy of these procedures is the risk of error and the potential value of additional procedural protections. Although Minn. Stat. Ann. §626.556 does not incorporate an adversary hearing with cross-examination and representation by counsel, we do not believe such procedures are constitutional prerequisites under the circumstances. As we have noted above, the County's investigation is intended to be thorough and complex, drawing on the resources of health-related professionals and a variety of county law enforcement and social service personnel.

Moreover, the ex post procedures for review are fully adequate to test the veracity of the County Department's

finding in that these procedures substantially incorporate truth-testing measure long approved by our legal system. We note that ex post procedures have previously been approved by the courts in cases which bear comparison with the case at bar. Thus, the Second Circuit recently declared, "Where a pre-deprivation hearing is impractical and a post-deprivation hearing is meaningful, the State satisfies its constitutional obligation by providing the latter." Gigio v. Dunn, 732 F.2d 1133, 1135 (2nd Cir. 1984), cert. denied, 105 S.Ct. 328 (1985). In cases which require fast action to protect the interests of children, e.g., Duchesne v. Sugarman, 566 F.2d 817, 826 (2d Cir. 1977), or where an ex ante intervention by the state was based on a generally reliable ex ante finding, see Barry v.

Barchi, 443 U.S. 55, 64-65 (1979), such procedures have been upheld. Moreover, reasoning by negative example, ex post procedures are generally disapproved where the state's only post-termination process lies in an independent tort action. Logan v. Zimmerman Brush Co. 455 U.S. 422, 437-37 (1982). In this case, the statute's tort remedy is amply supplemented by the full procedural protections embodied in the state APA and supporting rules. In addition, we believe that the interjection of fuller procedural protections at an earlier state in the process would be unduly time-consuming and cumbersome, and might well reduce important protections which the state legislation designed for otherwise vulnerable children.

Third, we consider the government's interests, including the burdens imposed

by additional procedural protections. The government has a strong interest in protecting powerless children who have not attained their age of majority but may be subject to abuse or neglect. To the extent that pre-investigation procedural protections might delay or frustrate the protection of these children, we believe the government's interest might be impaired. In addition, although the pecuniary cost of such additional protection might not be great, to the extent that it would be duplicative of ex post procedures we have discussed at length, whatever cost would be entailed would be wasteful.

Thus, based on our review of the relevant statutes and their underlying administrative rules, we conclude that the Bohns' interests were adequately protected by the available procedures.

Our discussion has, in part, touched on the available means of administrative review which we have approved, yet we have not resolved the additional due process question raised by the Bohns: despite the adequacy of the review procedure, did state officials deny the Bohns due process by misrepresenting to their attorney that administrative review was unavailable?

III. DUE PROCESS AND OFFICIAL MISREPRESENTATION ABOUT THE AVAILABILITY OF PROCEDURAL REVIEW

Initially, we set forth a chronology of the events which the Bohns allege constituted misrepresentations about the availability of their appeal rights. The familial conflict which gave rise to this litigation occurred on May 31, 1982, with a prompt investigation and a finding of child abuse a few days later. The Bohns argue that a supervisory social worker in

the County Department advised them orally, on June 4, 1982, that the finding of child abuse was final and unappealable. Three days later, the Bohns' attorney made three phone calls to an attorney assigned to the County Department of Social Services, and none of the calls was returned. On June 11, the Bohns' attorney requested an opportunity to present evidence that would contradict the finding, but the County Department advised them that the investigation was complete. The County Department made no reference to proper procedure for appealing the determination.

The Bohns then commenced an action in Dakota County Juvenile Court on July 9, 1982, in an apparent attempt to demonstrate that the Bohn children were not abused or neglected. Although the juvenile court subsequently declined

jurisdiction, at this hearing the assistant County attorney suggested that the Bohns appeal under the "Fair Hearing Act." Accordingly, the Bohns' attorney spoke with an official of the State Department of Public Welfare, who said that he did not believe that a finding of child abuse was appealable, but suggested that the Bohns send a letter to inquire further. As we discuss below, in this letter, the Bohns' attorney requested an appeal "pursuant to Minnesota Statutes 256.045 [6] or any other statute." He asked "that services now being provided by the

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6 Minn. Stat. Ann. §256.045 provides for state agency hearings for applicants for public assistance whose application "is denied, not acted upon with reasonable promptness, or whose assistance is suspended, reduced, terminated, or claimed to have been incorrectly paid." On its face, the statute does not apply to the Bohns' situation, as noted by the state official who responded to the Bohns' attorney.

Dakota County Department of Human Services be terminated or, in the alternative, that the Department be directed to proceed in Dakota County Juvenile Court." The state appeals referee responded that the statute "contains no language which provides authority to conduct a hearing for the purpose of reviewing the appropriateness of services provided in response to the identification of child abuse. * * * [T]he issue you present is not appealable under MSA 356.045."

After the juvenile court action was dismissed in September, 1982, and unsuccessfully appealed to the Dakota County district court, the Bohns appealed the matter to the Minnesota Supreme Court in January, 1983. The Bohns concede in their brief before this Court that, on that appeal, six months after the

incident at issue, "the attorney representing the Dakota County Department of Human Services referred to Minnesota statutes concerning the review of private data maintained by a department as providing the means of appealing a finding of child abuse. This was the first information provided by defendants concerning a means of appeal. There was no mention of any administrative procedures." (Appellant's Brief at 12). In light of this information, the Bohns dismissed their appeal to the State Supreme Court (after a prehearing conference in which one of the justices suggested a civil rights suit as possible remedy) and sought disclosure of the documents maintained by Dakota County authorities under the Minnesota Data Practices Act. The Bohns' attorney requested that several documents be

changed to state the Mr. Bohn had not abused his children; the director of the County Department replied that the documents were accurate and would not be changed unless the requested change was more specific. The County Department made no reference to the availability of any further review procedures.

The Bohns concurrently pursued several political remedies, including requests for assistance from their elected County Commissioner, the Dakota County Human Services Board and their state representative. Because these efforts were unavailing, the Bohns commenced the present section 1983 action.

The Bohns contend that this drawn-out quest for relief through administrative review violates their due process rights. Although this Court has not previously

addressed this issue, we find guidance in decisions of other courts in analogous cases discussing official misrepresentation regarding appeal rights. Thus, when the Community Service Administration abolished many positions as part of a reduction-in-force due to shrinking appropriations, it was held to violate due process when the agency failed to notify an employee that voluntary retirement extinguished his right to appeal: "The agency's additional failure to inform him that a retirement election would preclude a later appeal denied him the right to consider this fact in making his decision." Covington v. Department of Health and Human Services, 750 F.2d 937, 943 (Fed. Cir. 1984). That Court added, "A decision made 'with blinders on,' based on misinformation or a lack of information, cannot be binding as a

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matter of due process."

The Covington Court relied on Shubinsky v. United States, 488 F.2d 1003 (Ct. Cl. 1973), which also involved termination of a government employee. When the general notification of reduction-in-force was issued, it erroneously advised employees that the United States Civil Service Commission would not consider employee appeals. Although the employee's specific notice allowed an appeal of his termination, he did not appeal because his agency had been "liquidated." In deciding in favor of the employee, the Court held:

> Having misrepresented by written notice the factors material to plaintiff's preference-eligible rights, it became incumbent upon defendant to rectify such misrepresentation in similar written form. This defendant failed to do. Instead, defendant continued to represent to plaintiff, even after the issuance of the specific notice of RIF, that [his laboratory] had been "disestablished," rather than "reorganized" (as in

its notice of July 1, 1970 extending plaintiff temporary retention on government payroll for a period equal to his accumulated sick leave).

Id. at 1006

Similarly, in another case considering allegations of unlawful overcharges in natural gas contracts, the Temporary Emergency Court of Appeals held:

> When an agency itself has explicitly represented that reconsideration is not available after a certain type of ruling, and its regulations are not clearly to the contrary, resort to an otherwise available judicial remedy should not be precluded for failure to exhaust administrative remedies.

Air Products & Chemicals, Inc. v. United Gas Pipeline, 503 F.2d 1060 (Temp. Em. Ct. App. 1974).

On the other hand, the Seventh Circuit has held that exhaustion requirements may be imposed where complainants had notice of available review procedures and did not exercise their option:

> The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the com-

> plainant merely declines or fails to take advantage of the administrative procedure. * * * [A] state cannot be held to have violated due process requirement when it has made procedural protection available and the plaintiff has simply refused to avail himself of them [sic].

Dusanek v. Hanon, 677 F.2d 538, 542-43 (7th Cir.), cert. denied, 459 U.S. 1017 (1982)

In the circumstances, we cannot say that the state's administrative review procedures were so opaque or that state officials so misrepresented the availability of the procedures that the Bohns' attorney ought not to have been able to ascertain the proper method for obtaining review. Regarding the complexity of the procedures as set out in the statutes and administrative regulations, we agree with the Bohns' attorney that the regulations, as codified in MCAR, were difficult to locate. Nevertheless, as an attorney, he had the duty to his clients to inform

himself thoroughly regarding the law and supporting administrative regulations. We find it unpersuasive to suggest that a due-process defect lies in the absence of a cross-reference citation to the section of the state APA when Chapter 13 refers to the APA by name as the proper vehicle for administrative review. In addition, we believe that the statutory authorization for the chief hearing examiner to promulgate regulations should have put the Bohns' attorney on notice that the regulations were publicly available to assist claimants and their attorneys. In any event, the problem should have been solved no later than January, 1983, when, six months after the alleged abuse, attorneys for the County cited the specific statutory provisions under which the Bohns could seek administrative relief.

The state's erroneous misrepresentations present a slightly more difficult problem, but they, too, do not rise to the level of a due process deprivation. Simply put, the Bohns' attorney asked the wrong question and got the right answer. In his letter to the State Department of Public Welfare, the attorney asked for an appeal under section 256.045, which covers appeals for denial of benefits. Although he requested an appeal under any other statute as well, he sought a termination of benefits, not a review of the data underlying the finding of child abuse; and although the state official might have drawn the right conclusion, we cannot say, from that request, that it was a denial of due process if he failed to do so.

After January, 1983, when the Bohns' attorney belatedly learned of the data

practices statute, he should have been on notice of the relevant appeal procedures. Although the County Department made no reference to available appeal procedures, the statute under which the Bohns had sought correction includes the provision, "The determination of the responsible authority may be appealed pursuant to the provisions of the administrative procedure act relating to contested cases." Minn. Stat. Ann. §13.04, subd. 4. Relying on his professional instincts and training, the Bohns' attorney ought reasonably to have consulted this section. After seeing reference to the promulgation of rules, Minn. Stat. Ann. §14.51, he ought reasonably to have sought out the applicable volume of MCAR or to have contacted the appropriate state officials, which he finally did in February, 1984, to learn about the state

regulations governing appeal of contested cases.

We do not comment on the alleged oral misdirections by state or county officials because they are not a part of this record. The other instances of miscommunication between the Bohns' attorney and state or county officials resemble the two exchanges of correspondence we have just discussed: either the Bohns' attorney asked the wrong question or did not pursue the full implications of the information he obtained. Under the circumstances, then, we cannot say that these misdirections contributed to a due process violation.

We add, however, that this holding is confined by the facts of this case. As in some of the termination cases we have cited, more serious misdirection by state officials which nullifies a complainant's

right to appeal might well contribute to a due process violation. Had the Bohns not had an attorney who was trained to read and interpret complex statutes, we well might have reached a different result. See United States v. Boyle, 53 U.S.L.W. 4059, 4062 (January 9, 1985).[7] Perhaps most important, if the Bohns were permanently foreclosed from offering at a hearing the evidence they claim exonerates them, we might reach a different result. But the attorney for the County,

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> When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code would nullify the very purpose of seeking the advice of a presumed expert in the first place.
>
> United States v. Boyle, 53 U.S.L.W. at 4062.

in his brief before this Court, has represented that, during the pendency of their section 1983 action, the Bohns "were advised that [administrative review] procedures were still available. These procedures remain available to appellants even today[.]" From this, we conclude that the County is willing to participate in the panoply of procedures we have set forth in this opinion and to allow the Bohns a full hearing to present the evidence they say will set the record straight.

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Wayne Louis and Sharon Anne Bohn	)	No. 4-83-733 Civil
Plaintiff	)	
-vs-	)	Clerk's Notice under Rule 77(d) F.R. Civil Procedure or Rule 49(c) of F.R. Criminal Procedure
County of Dakota; Shirley L. Utzinger et al	)	
Defendant	)	

You are hereby notified that in the above-entitled cause, on the 9th day of October, 1985 we filed Certified Copy of Opinion from the Court of Appeals, Eighth Circuit that the Judgment of the district court is affirmed.

Certified copy of Judgment from the Court of Appeals, Eighth Circuit that Upon reconsideration of the premises it hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion

of this Court. September 11, 1985.

By: Deputy Clerk

Dale C. Nathan
3435 Washington Drive, Suite 201
Eagan, MN 55122

Meagher, Geer, Markham, jAnderson [sic],
Adamson, Flaskamp & Brennan
W.D. Flaskamp
2250 IDS Center
Minneapolis, MN 55402

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

WAYNE LOUIS BOHN and SHARON ANNE BOHN, Individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a Minor, and Wayne Arthur Bohn, Plaintiffs, v. COUNTY OF DAKOTA; SHIRLEY L. UTZINGER, Director of Social Services, Dakota County Human Services Department; BETH WELSONS, Worker, Child Protection Assessment Unit; ANTHONY A. BIBUS, Supervisor, Child Protection Assessment Unit; KENNETH E. MALVEY, Assistant County Attorney; ROBERT F. CAROLAN, County Attorney; DAKOTA COUNTY HUMAN SERVICES BOARD; JOHN S. VOSS, Chairman, JOSEPH A. HARRIS, GERALD E. HOLLENKAMP, STEVEN LOEDING and RUSSELL L. STREEFLAND, Defendants.	MEMORANDUM OPINION AND ORDER Civil No. 4-83-733

DALE C. NATHAN, Esq., Eagan, Minnesota, appeared on behalf of plaintiffs.

DOUGLAS J. MUIRHEAD, Esq., Meaher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan, Minneaplis, Minnesota, appeared on behalf of defendants.

Plaintiffs commenced this action pursuant to 42 U.S.C. §§1983, 1985, and 1986. The complaint alleges a deprivation of the plaintiffs' procedural due process rights. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331 and 1333. Now before the court is defendants' motion to dismiss plaintiffs' amended complaint for failure to state a claim upon which relief may be granted. In the alternative, defendants seek dismissal of certain defendants and to have various portions of the complaint stricken. Plaintiffs have filed a motion to permit

them to amend their amended complaint, to commence discovery, and for attorney's fees and costs.[1]

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[1] Plaintiffs seek to amend their complaint to add the following paragraphs:

> 11(a). At all times material herein, defendants Shirley L. Utzinger, Beth Welshons, Anthony A. Bibus, Kenneth E. Malvey, Robet F. Carolan, John S. Voss, Joseph S. Harris, Gerald E. Hollenkamp, Steven Loeding, and Russell L. Streefland were duly appointed, qualified and acting in their respective official capacities and employment, and each of them was acting under power of the statutes, ordinances, regulations, customers [sic] and usages of the State of Minnesota, the County of Dakota.
>
> 11(b). Defendant County of Dakota, a municipal corporation under the laws of the State of Minnesota, at all times material herein, was the employer of the individually named defendants and each of them. Said County of Dakota, at and for all times material herein, provided the individually named defendants, and each of them, with official duties and titles and it was in the name or and/or under the power of authority of the County of Dakota that the individually named defendants, and each of them, performed the acts and omissions alleged herein.

These paragraphs do not alter the basis

Background

Plaintiffs Wayne L. Bohn and Sharon are the natural parents of plaintiffs Wayne A. Bohn, age 18, and Bradley Bohn, age 13. Wayne L. and Sharon Bohn bring this suit individully as as natural guardians and guardians ad litem for their two sons.

Defendant Dakota County is a municipal corporation located in Minnesota. Dakota County exercises general corporate powers, including the provision and maintenance of social services through the Dakota County Department of Human Services. Defendants Shirley L. Utzinger, Beth Welshons, and Anthony Bibus are all employees of the Department of Human Services, Defendant Kenneth E. Malvey is

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of plaintiffs' claim and, in light of the court's resolution of this matter, further amendment of the complaint would serve no useful purpose.

an Assistant County Attorney of Dakota County and at all times relevant to the complaint was assigned to the Department of Human Services. Defendant Robert F. Carolan is the County Attorney of Dakota County. Defendants John Voss, Joseph Harris, Gerald Hollenkamp, Steven Loeding, and Russell L. Streefland are members of the Dakota County Human Services Board.

On May 31, 1982, while Wayne L. was doing some construction work on the family house, a fight developed between Wayne A. and his brother Bradley. When Wayle L. became aware of the fight he intervened and used force to restrain Wayne A.

Wayne A. immediately ran to the home of a nearby neighbor, and the Eagan Police Department was subsequently notified of the incident. After conducting an

investigation, the Eagan police reported the matter to the Assessment Unit of the Department of Human Services.

After conducting her own investigation, defendant Beth Welsons, who was assigned to the Assessment Unit, concluded there was "substantiated evidence" of an incident of child abuse. A Child Protection Worker was subsequently assigned to the Bohn family who met privately with Wayne A. and Bradley. In addition, the Department of Human Services interviewed teachers and friends of Wayne A., as well as neighbors and associates of the Bohn family.

On June 4, 1982, a licensed physician examined Wayne A. and found no evidence of physical abuse. A copy of the physicians' report was furnished to defendants on June 7, 1982. On June 15, 1982, Wayne A. sent a letter to defendant

Dakota County Department of Human Services stating that the allegations of child abuse were in error and demanded that any futher [sic] proceedings based on these allegations be discontinued.

In telephone conversations and a letter dated June 16, 1982, defendant Anthony A. Bibus allegedly advised plaintiffs' attorney that the finding of child abuse and the determination of the need for a child protection worker was final and not subject to review. Consequently, plaintiffs' counsel initiated an action in Dakota County Juvenile Court in an attempt to obtain judicial review of the defendants' actions. The case was dismissed for lack of a justiciable controversy. Plaintiffs' counsel also appealed to the Minnesota Department of Public Welfare, but the agency declined review on the basis that it lacked

jurisdiction to review matters relating to child abuse. Plaintiffs then brought the matter to the attention of a Dakota County Commissioner and the Dakota County Human Services Board. Both advised the plaintiffs that because the matter was in litigation they were unable to intervene.

By letter dated April 29, 1983, sent to Shirly [sic] Utzinger at the Dakota County Human Services Department, plaintiffs' counsel requested, pursuant to Minn. Stat. § 15.165, that the records of the department be corrected to state that plaintiff Wayne L. did not abuse his son Wayne A. Utzinger replied in a letter dated May 27, 1983, indicating that the records had been reexamined and found to be accurate.

Based on these factual allegations, plaintiffs allege that their due procees rights have been violated. The complaint

alleges that Minn. Stat. § 626.556, which provides for the reporting of suspected child abuse, fails

> to provide procedures by which a person determined to have abused his child is given notice of how the finding can be contested,...learning the names of the relevant witnesses, cross-examining witnesses, presenting testimony and evidence in his defense, gaining full and free access to the evidence against him or disproving the evidence on which the finding is based.

Plaintiffs allege that as a result of defendants' investigtion [sic] and findings of child abuse they have suffered irreparable harm to their family relationships and reputation. In addition, plaintiffs allege that defendants' actions have led to the constructive termination of their right to be foster parents.

In a section labeled "an additonal [sic] cause of action", the complaint alleges that defendants' actions

were taken as part of a conspiracy

against plaintiffs and others in that the defendants were engaged in a campaign against child abuse...and zealously sought out plaintiffs as candidates for findings of child abuse...for the purpose of justifying more staff and funds, or for political self-enhancement, all in willful disregard of the plaintiffs' rights, privileges and immunities secured by the United States Constitution and the Constitution and laws of the State of Minnesota...

The complaint also alleges that

the defendants, by failing to make reasonable inquiries, or to reasonable [sic] evaluate ad consider information obtained by them or provided by them, were grossly negligent in the investigation conducted to determine if plaintiff Wayne Louis Bohn had abused his son, or plaintiff Wayne Arthur Bohn was an abused child.[2]

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[2] Plaintiffs' "additional cause of action" is apparently an attempt to state a claim under 42 U.S.C. §§1985 and 1986. Section 1985 does not provide a cause of action for violations of due process however. Dunn v. Gazzola, 216 F.2d 709 (1st Cir. 1954); Oaks v. City of Fairhope, 515 F.Supp. 547 (D. Tex. 1981). And § 1986 may not be invoked unless a claim exists under § 1985. See e.g., Williams v. St. Joseph Hospital, 629 F.2d 448 (7th Cir. 1980); Hamilton v. Chaffin, 506 F.2d 904 (5th Cir. 1975); Tumulty v. City of Minneapolis, 511 F.Supp. 36 (D. Minn.

Discussion

Plaintiffs argue that their rights associated with the parent-child relationship and being a foster parent have been impaired as the result of defendants' actions pursuant to Minn. Stat. § 626.556. This statute provides for the reporting and investigation of suspected child abuse. Plaintiffs contend that they have been denied the opportunity to challenge defendants' finding that Wayne L. Bohn abused his son. A careful reading of the relevant statutes and supporting administrative rules indicates, however, that the legislative scheme provides due process.

The reporting of child abuse is governed by Minn. Stat. § 626.556. The statute requires certain persons, such as

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1980). Plaintiffs' additional cause of action therefore fails to state a claim upon which relief may be granted.

doctors, social workers, etc., to report information concerning child abuse to the local welfare agency, police department, or county sheriff. Minn. Stat. § 626.556, subd. 3. Other persons may report such information voluntarily, Id. The local welfare agency is required immediately to investigate such reports and offer social services for purposes of preventing further abuses. Id. at subd. 10.

In performing these duties, the local welfare agency is required to maintain records, which are considered "private data" as defined in Minn. Stat. § 13. Id. Private data is not available to the public, but may be obtained by the individual who is the subject of the data. Minn. Stat. § 13.02, subd. 12. While the name of the reporter is kept confidential, the reporter's name may be

obtained after the investigation is complete upon court order. Minn. Stat. § 626.556, subd. 11.

Under the Minnesota statute governing data practices, an individual who is the subject of government data may contest its accuracy or completeness. Minn. Stat. § 13.04, subd.4. To exercise this right the individual simply notifies the responsible authority and describes the nature of the disagreement. Id. The authority has 30 days to either correct the data found to be inaccurate and attempt to notify past recipients or notify the individual that the authority believes the data to be correct. Id.

By letter dated April 29, 1983, plaintiffs' counsel initiated this procedure by notifying defendant Dakota County Human Services Department of their claim that records maintained in regard

to the Bohn family were inaccurate. The Human Services Department responded by letter dated May 27, 1983, and, in conformance with the statute, informed plaintiffs' counsel that the records had been reviewed and determined to be accurate. Upon receiving the Department of Human Service's [sic] response, plaintiffs' counsel apparently concluded further review was unavailable and thus commenced this suit.

Plaintiffs' counsel's conclusion that no further review was possible, however, was erroneous. Minn. Stat. § 13.04, subd. 4 specifically provides that if an individual us unsatisfied with the determination of the responsible authority concerning the accuracy of the data, he or she may appeal the determination pursuant to the provisions of the Administrative Procedure Act relating to

"contested cases." This provision is implemented through regulations promulgated by the Commissioner of Adminsitration and set forth in the Minnesota Code of Agency Rules (MCAR) as sections 2 MCAR §§ 1.201 to 1.220. Rule 2 MCAR 1 1.215 provides that appeals from decisions of responsible authorites may be mnde to the Commissioner of Administration who in turn will refer the case to the Office of Administrative Hearings for a contested case hearing pursuant to the Administrative Procedure Act, Minn. Stat. Ch. 14.

The procedure for contested cases is set forth at Minn. Stat. §§ 14.57 to 14.62 and at 9 MCAR §§ 2.201 et. seq.. A hearing examiner is appointed, and a hearing is held after reasonable notice to all parties. Id. at § 14.50, § 14.58. The statute provides for de novo review, and any evidence that possesses probative

value may be admitted. Id. at § 1.460, subd. 1. Each party has the right to cross-examine witnesses and to submit rebuttal evidence. Id. at subd. 4. Upon his own initiative or upon written request of any interested party, the chief hearing examiner may issue a subpoena for the attendance of a witness or the production of books, papers, records or other documents as are material to the matter being heard. Id. at § 14.51. The subpoenas are enforceable through the district court in the district in which the subpoena is issued. Id.

These statutory and regulatory provisions indicate that plaintiffs are provided with a procedure to challenge defendants' finding of child abuse and that the procedure comports with constitutional requirements of due process.

The statutes and regulations provide the right to a hearing, to discovery, to present evidence or witneses [sic], and to cross-examine adverse witnesses. If plaintiffs wish to obtain the names of the individuals reporting the allegations of child abuse, they may seek a subpoena from the chief hearing examiner, which is enforceable through the district court, or submit an application directly to the district court. See Minn. Stat. § 14.51. Given these provisions, plaintiffs have failed to state a claim for a violation of their right to due process. See Parratt v. Taylor, 451 U.S. 527 (1981); Ingraham v. Wright, 430 U.S. 651 (1977); Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982).

Because of this determination it is not necessary to discuss other issues raised by the parties, and since plaintiffs'

federal claims should be dismissed, jurisdiction is lacking over any pendent claims.

O R D E R

Accordingly, based on all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss plaintiffs' complaint, for failure to state a claim upon which relief can be granted, is granted.

2. Plaintiffs' motion to amend their amended complaint, to commence discovery, and for attorney's fees and costs is denied.

Dated: May 1, 1984.

/s/ Diana E. Murphy
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Wayne Louis Bohn, etc.	) No. 4-83 Civil 733
Plaintiff(s)	)
vs.	) Clerk's Notice under Rule 77(d) F.R. Civil Procedure or Rule 49(c) F.R. Criminal Produre
County of Dakota, et al	)
Defendant(s)	)

You are hereby notified that in the above-entitled cause, on the 1st day of May, 1984, we filed Judge Murphy's Memorandum Opinion and Order that defendants' motion to dismiss plaintiffs' complaint, for failure to state a claim upon which relief can be granted, is granted. Plaintiffs' motion to amend their amended complaint, to commence discovery, and for attorney's fees and costs is denied. Judgment was entered accordingly.

ROBERT E. HESS, CLERK

By: Deputy Clerk

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